

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 16, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALAN D. ROBERTSON,

Plaintiff,

v.

LORNE A. DORN; and KIM DORN,

Defendants.

No. 2:21-CV-00064-SAB

ORDER RE: MOTIONS

Before the Court are Plaintiff's Motion to Exclude Defense Experts Norton, Capron, and Ries, ECF No. 79; Defendants' Motion to Continue Briefing Deadlines Associated with Plaintiff's Motion to Exclude Expert Witnesses, ECF No. 94; Plaintiff's Motion to Exclude Loftus, ECF No. 98; Providence Sacred Heart Medical Center's Motion for Protective Order, or in the Alternative, to Quash or Modify Subpoena, ECF No. 125; and Providence Sacred Heart Medical Center's Motion to Expedite, ECF No. 126. Plaintiff is represented by David Beninger; Mark Kamitomo; Patricia Anderson; and George Ahrend. Defendants are represented by Patricia Buchanan; Megan Starks; and Sara Sutton. Providence Sacred Heart Medical Center is represented by Andrew Wagley and Stephen Lamberson. The motions were considered without oral argument.

The Court will first address Plaintiff's Motions to Exclude. The Court will then address Providence Sacred Heart Medical Center's Motion for Protective Order and Defendants' Motion to Continue.

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ORDER RE: MOTIONS # 1

Factual Background

On January 30, 2020, sometime in the afternoon or evening, Plaintiff Alan Robertson pulled over in his car when he saw an injured deer in the roadway. At the time, Laura Liebman (Plaintiff's partner) and Ali Wiley (Ms. Liebman's 17-year-old niece) were riding in the car with Plaintiff. Plaintiff alleges that he remembers that the deer was located in the northbound lane (the lane that Plaintiff was traveling in), except for its hindquarters, which were on the center line. Ms. Liebman, in her deposition, also stated that she remembered seeing Plaintiff and the deer in the northbound lane. However, Ms. Wiley in her deposition stated that she remembered seeing the deer in the southbound lane (the lane that Defendants were traveling in), closer to the center line, and that Plaintiff was trying to drag the deer to the opposite shoulder of the road. Regardless, as Plaintiff was dragging the deer to the side of the road, Defendants Lorne and Kim Dorn drove down the road and struck Plaintiff with their pickup truck—Mr. Dorn was driving, while Mrs. Dorn was in the passenger seat. Defendants were on their way home from skiing at Red Mountain in British Columbia when they hit Plaintiff. Defendants allege that they did not see Plaintiff or the deer in the road at the time of the collision.

After the collision, Plaintiff was flown to Providence Sacred Heart Medical Center. While Plaintiff was in the emergency room, he received a test called the serum/plasma enzymatic immunoassay ("the EIA test"), along with various other tests and treatments for his injuries. Hospitals use the EIA test as an initial screening test for the presence of alcohol. Specifically, the EIA test adds a reagent, alcohol dehydrogenase (ADH), and a coenzyme, nicotinamide adenine dinucleotide (NAD⁺), to a patient's serum/plasma sample. The ADH catalyzes any ethanol in the sample to acetaldehyde, which reduces NAD⁺ to nicotinamide adenine dinucleotide hydride (NADH). Thus, the EIA test measures the resulting level of NADH as a proxy for the level of alcohol in the sample. Plaintiff's EIA test showed 79 mg/dL of the NADH enzyme—Plaintiff argues that this was within

1 normal limits, whereas Defendants argue that this indicates an elevated alcohol
2 level.

3 **Procedural History**

4 Plaintiff filed his Complaint in the Stevens County Superior Court on
5 November 16, 2020. ECF No. 1-1. In the Complaint, Plaintiff named Defendants
6 Lorne and Kim Dorn; Desjardins General Insurance Group d/b/a Certas Home and
7 Auto Insurance Company (“Certas”); and any other John Does that may have
8 liability arising from the collision. Plaintiff asserted claims for breach of express or
9 implied terms and conditions of the insurance contract; violations of the Consumer
10 Protection Act; negligence; and estoppel from denying insurance coverage or
11 benefits.

12 Defendants removed the case to federal court on January 28, 2021, based on
13 diversity jurisdiction. ECF No. 1. On March 3, 2021, Defendant Certas filed a
14 Motion for Summary Judgment. Judge Rosanna M. Peterson granted the motion on
15 August 6, 2021, thereby dismissing Certas from the case. ECF No. 27. The case
16 was then reassigned to Chief Judge Stanley A. Bastian on October 21, 2021. ECF
17 No. 43.

18 Jury trial in this case was originally set for April 18, 2022. ECF No. 65.
19 However, due to the parties’ continued discovery disputes, the Court reset the trial
20 date to August 29, 2022. ECF No. 75. Plaintiff filed his Motion to Exclude
21 Defense Experts Norton, Capron, and Ries on December 28, 2021. ECF No. 79.
22 Defendants filed their Motion to Continue Briefing Deadlines Associated with
23 Plaintiff’s Motion to Exclude Defense Experts Norton, Capron, and Ries on
24 January 3, 2022. ECF No. 94. Plaintiff filed his Motion to Exclude Loftus on
25 January 4, 2022. ECF No. 98. Providence Sacred Heart Medical Center, an
26 interested third party, filed its Motion for Protective Order, and associated Motion
27 to Expedite, on February 6, 2022. ECF Nos. 125, 126.

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ORDER RE: MOTIONS # 3

I. Plaintiff's Motions to Exclude

Plaintiff seeks to exclude three of Defendants' expert witnesses: Mr. Brian Capron, Dr. Robert Norton, and Dr. Geoffrey Loftus.¹ For all three of these witnesses, Plaintiff argues that their testimony should be excluded because it is unreliable, irrelevant, and unduly prejudicial. For the reasons discussed below, the Court denies Plaintiff's motion to exclude Mr. Capron and Dr. Norton and grants in part and denies in part Plaintiff's motion to exclude Dr. Loftus.

a. Legal Standard

Fed. R. Evid. 702 provides the starting point for any evaluation of the admissibility of expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). It states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Although Rule 702 should be applied with a "liberal thrust" favoring admission, *Daubert*, 509 U.S. at 588, it requires that expert testimony be both relevant and reliable. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection

¹ Plaintiff's first motion also seeks to exclude defense expert Dr. Richard Ries. ECF No. 79. However, on January 5, 2022, Defendants filed a Notice that they were withdrawing Dr. Ries as a testifying expert. ECF No. 102.

1 to the pertinent inquiry. And it is reliable if the knowledge underlying it has a
2 reliable basis in the knowledge and experience of the relevant discipline.” *Id.* at
3 565.

4 The proponent of expert testimony has the burden of establishing that the
5 admissibility requirements are met by a preponderance of the evidence. *Daubert*,
6 509 U.S. at 592 n.10; *Lust v. Merrell Dow Pharms. Inc.*, 89 F.3d 594, 598 (9th Cir.
7 1996). “Shaky, but admissible evidence is to be attacked by cross examination,
8 contrary evidence, and attention to the burden of proof, not exclusion.” *Primiano*,
9 598 F.3d at 564. An opinion is not excludable merely because it is impeachable.
10 *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir.
11 2013). “After an expert establishes admissibility to the judge’s satisfaction,
12 challenges that go to the weight of the evidence are within the province of a fact
13 finder, not a trial court judge. A district court should not make credibility
14 determinations that are reserved for the jury.” *Pyramid Techs., Inc. v. Hartford*
15 *Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014). “Basically, the judge is supposed
16 to screen the jury from unreliable nonsense opinions, but not exclude opinions
17 merely because they are impeachable. The district court is not tasked with deciding
18 whether the expert is right or wrong, just whether his testimony has substance such
19 that it would be helpful to the jury.” *Alaska-Rent-A-Car*, 738 F.3d at 969-70.

20 b. Plaintiff’s Motion to Exclude Mr. Capron and Dr. Norton

21 Plaintiff requests that the Court strike defense experts (1) Brian Capron, a
22 Forensic Toxicologist from the Washington State Patrol Toxicology Laboratory;
23 and (2) Dr. Robert Norton, MD, along with any mention of Plaintiff’s alleged
24 alcohol intoxication on the night of the accident. Plaintiff argues that such
25 testimony is unreliable under Fed. R. Evid. 702, as well as irrelevant and unduly
26 prejudicial under Fed. R. Evid. 401-403. Specifically, Plaintiff argues that the *only*
27 evidence to support his intoxication on the night at issue is the EIA test performed
28 by the hospital when Plaintiff was brought to the emergency room. However,

1 Plaintiff states that this EIA test has been proven to be unreliable and that the
2 results of this test have been contradicted by all other fact witnesses. Finally,
3 Plaintiff argues that this evidence is not relevant because, under Washington law, it
4 is inadmissible to prove intoxication. Thus, Plaintiff argues that the Court exclude
5 any testimony from Mr. Capron and Dr. Norton pertaining to alcohol or
6 intoxication because it “interject[s] [] speculative and prejudicial conclusions.”
7 ECF No. 79 at 2.

8 Defendants in response argue that they have not yet deposed the Person
9 Most Knowledge from Providence Sacred Heart Hospital, who would be able to
10 provide more information regarding the EIA test—specifically, whether the
11 hospital takes any precautions to prevent against false positives. Defendants also
12 argue that intoxication evidence is admissible to impeach Plaintiff’s credibility and
13 to offer a plausible explanation for the collision. Finally, Defendants argue that
14 Plaintiff is not challenging Mr. Capron and Dr. Norton’s qualifications, but instead
15 is objecting to their specific conclusions, which (1) implicate questions regarding
16 the weight of the evidence, which is the province of the jury, and (2) are
17 premature, given that the parties have not yet been able to depose a representative
18 from the hospital.

19 Plaintiff in reply argues it is disingenuous for Defendants to argue that their
20 experts had sufficient information to formulate their conclusions that Plaintiff was
21 intoxicated, but then later—once challenged—claim that the experts are missing
22 basic information regarding Plaintiff’s EIA test results. Plaintiff also argues that
23 Defendants’ experts are unreliable because they failed to account for other
24 variables that might explain Plaintiff’s NADH level. Finally, Plaintiff argues that
25 relevance under *Daubert* is predicated on state substantive law, which does not
26 permit intoxication evidence of the kind that Defendants are trying to offer.

27 Plaintiff objects to Mr. Capron and Dr. Norton on both reliability and
28 relevance grounds. Thus, the Court addresses each in turn.

1 Reliability

2 Plaintiff's reliability objections primarily question whether Defendants'
3 expert witnesses accurately interpreted the EIA test. Specifically, Plaintiff argues
4 that Defendants' expert witnesses failed to consider factors other than alcohol that
5 may have affected Plaintiff's EIA test results. Plaintiff also argues that the EIA test
6 results are not reliable because of the multitude of witnesses who all state that they
7 did not see Plaintiff consume alcohol before the accident.

8 However, the Court finds that Plaintiff's reliability objections implicate
9 questions regarding the credibility and weight of the evidence, which are more
10 appropriately determined by the jury. *See Primiano*, 598 F.3d at 564 ("Shaky, but
11 admissible evidence is to be attacked by cross examination, contrary evidence, and
12 attention to the burden of proof, not exclusion.").

13 Relevance

14 Plaintiff also argues that Defendants' intoxication evidence is irrelevant.
15 Specifically, Plaintiff argues that, in order to prove an intoxication defense under
16 Washington law, Defendants must show beyond a reasonable doubt that Plaintiff
17 was either (1) per se intoxicated or (2) non-per se intoxicated. Plaintiff states that,
18 to show per se intoxication, Defendants would need to provide a blood or a breath
19 test that satisfies the standards adopted by the Washington State toxicologist—
20 which the EIA test does not. Conversely, to prove non-per se intoxication,
21 Defendants would have to provide evidence of a non-approved test along with
22 additional corroborating evidence of Plaintiff's intoxication—which Plaintiff
23 argues that Defendants do not have. Thus, Plaintiff argues that any evidence of his
24 purported intoxication is irrelevant.

25 Defendants in response argue that they can present sufficient evidence to
26 show non-per se intoxication, specifically (1) the EIA test results and (2) testimony
27 about Plaintiff's behavior prior to the accident, which can demonstrate his
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1 impaired judgment, dangerous behavior, reduced reaction time, and affected visual
2 abilities.

3 Plaintiff in reply reiterates that Defendants have no additional corroborating
4 evidence of Plaintiff's intoxication. Additionally, Plaintiff states that—if
5 Defendants' argument is that Plaintiff did not get out of the way fast enough,
6 which thereby contributed to the accident—Defendants do not need to rely on
7 intoxication evidence to make this argument. Thus, Plaintiff states that Defendants'
8 intoxication evidence should be excluded as irrelevant and unduly prejudicial.

9 The Court denies Plaintiff's motion. Under Washington state law, a
10 defendant can prove an affirmative defense of intoxication in a personal injury
11 action if the defendant can show (1) the plaintiff was under the influence of alcohol
12 at the time of the injury; (2) the plaintiff's intoxication was a proximate cause of
13 the injury; and (3) the trier of fact finds that the plaintiff was more than fifty
14 percent at fault. Wash. Rev. Code § 5.40.060(1).

15 Washington courts have found that the defendant must place careful
16 emphasis on the proximate cause element. Specifically, a defendant cannot merely
17 introduce evidence of a plaintiff's intoxication and have an expert testify that—
18 given the plaintiff's blood alcohol content—it is likely that the plaintiff's
19 intoxication caused them to act in a way that proximately caused the accident.
20 *Gerlach v. Cove Apartments, LLC*, 196 Wash. 2d 111, 123-24 (2020)
21 (“[Defendant] Cove offered the BAC results and Dr. Vincenzi’s testimony to prove
22 [Plaintiff] Gerlach’s intoxication was a proximate cause of her injuries and that she
23 was than 50 percent at fault. But . . . Dr. Vincenzi’s proffered testimony was
24 merely speculative as to Gerlach’s behavior. He was going to speak to the general
25 effects of intoxication, not the effect it actually had on Gerlach.”); *see also State v.*
26 *Lewis*, 141 Wash. App. 367, 389 (2007).

27 But a defendant *can* still introduce evidence of the plaintiff's intoxication to
28 satisfy the first element of the affirmative defense: that the plaintiff was under the

1 influence of alcohol at the time of the injury. *Fite v. Mudd*, __ Wash. App. __, 498
2 P.3d 538, 546 (Wash. Ct. App. 2021) (“*Gerlach*’s holding is narrower than a
3 blanket exclusion of all urinalyses or toxicology reports showing the presence of
4 intoxicants Instead, *Gerlach* only prohibits [a defendant] from relying solely
5 on such a report to supportive the affirmative defense the urine screening here
6 is still available for our de novo consideration of whether there was an issue of fact
7 as to [Plaintiff’s] intoxication.”).

8 There are two ways to prove intoxication under Washington law: (1) per se
9 intoxication and (2) non-per se intoxication. *See* Wash. Rev. Code §§ 5.40.060(1),
10 46.61.502; *see also State v. Donahue*, 105 Wash. App. 67, 73 (2001). Per se
11 intoxication is when a person is found to have an alcohol concentration of 0.08 or
12 higher as shown by an analysis of the person’s breath or blood made under Wash.
13 Rev. Code § 46.61.506. Wash Rev. Code § 46.61.502(1)(a). On the other hand,
14 non-per se intoxication is when there is other competent evidence to show that a
15 person was under the influence of or affected by intoxicating liquor. Wash Rev.
16 Code § 46.61.502(1)(b)-(c).

17 In order for a breath or blood test to satisfy per se intoxication, the test must
18 have been “performed according to methods approved by the [Washington] state
19 toxicologist and by an individual possessing a valid permit issued by the state
20 toxicologist for this purpose.” Wash. Rev. Code § 46.61.506(3); Wash. Admin.
21 Code 448-14-010. Here, because Plaintiff’s EIA test was performed by the hospital
22 as part of his medical treatment, the Court agrees that the EIA test is insufficient to
23 prove per se intoxication. *See Armstrong v. Masker*, 2005 WL 762481 * 6 (Wash.
24 Ct. App. 2005).

25 However, an EIA test can be used to argue in support of non-per se
26 intoxication. Evidence that courts consider when determining non-per se
27 intoxication include whether there are positive blood or breath tests indicating
28 intoxication; whether the plaintiff admitted to their own intoxication; whether there

1 is witness testimony about the plaintiff's consumption of alcohol; and whether
2 there is witness testimony about the plaintiff acting in a manner consistent with
3 intoxication. *See Fite*, 498 P.3d at 546 (finding sufficient evidence to support a
4 dispute of material fact regarding the plaintiff's intoxication where there was a
5 positive urine screening, the plaintiff's admission, and evidence of behavior
6 consistent with intoxication); *Gerlach*, 196 Wash. 2d at 126 (noting that none of
7 the plaintiff's companions testified as to how many drinks she consumed or
8 whether she was extremely intoxicated); *Peralta v. State*, 187 Wash. 2d 888, 903
9 (2017) (the plaintiff admitted that she was under the influence of intoxicating
10 liquors).

11 Here, Plaintiff argues that Defendants' EIA test should be excluded because
12 (1) without any other corroborating evidence of Plaintiff's intoxication, the EIA
13 test is insufficient for Defendants to show non-per se intoxication and thus (2) the
14 EIA test is irrelevant and only serves to be unduly prejudicial. *See Gerlach*, 196
15 Wash. 2d at 120 ("When evidence is likely to stimulate an emotional response
16 rather than a rational decision, a danger of unfair prejudice exists Here, the
17 trial court appropriately determined [Defendant's] proffered evidence was only
18 minimally probative of the issues relevant to its affirmative defense and found the
19 relative risk of prejudice against [Plaintiff] was unacceptably high.") (internal
20 citations and quotation omitted).

21 Defendants on the other hand argue that they do have sufficient evidence to
22 create a dispute of material fact of Plaintiff's intoxication because they have both
23 (1) the EIA test result and (2) testimony about Plaintiff's behavior right before the
24 collision, specifically that he did not get out of the way until the last second,
25 despite the car being visible before then.

26 Defendants have met their burden of showing that their intoxication
27 evidence, including Mr. Capron's and Dr. Norton's testimony, is relevant. Fed. R.
28 Evid. 401's "basic standard of relevance is a liberal one." *Crawford v. City of*

1 *Bakersfield*, 944 F.3d 1070, 1077 (9th Cir. 2019) (citing *Daubert*, 509 U.S. at 587).
2 Specifically, evidence is relevant if: (a) it has any tendency to make a fact more or
3 less probable than it would be without the evidence; and (b) the fact is of
4 consequence in determining the action. Fed. R. Evid. 401. Here, Defendants’
5 intoxication evidence and expert testimony from Mr. Capron and Dr. Norton are
6 relevant to their affirmative defense of intoxication—specifically non-per se
7 intoxication.

8 Additionally, Mr. Capron’s and Dr. Norton’s testimony do not raise the
9 same kinds of concerns that were at issue in *Gerlach*. Here, Defendants’ experts
10 are not concluding that, just based on Plaintiff’s EIA test results, it is likely that
11 Plaintiff’s behavior was a proximate cause of the accident and his injuries. Instead,
12 Mr. Capron and Dr. Norton are simply relying on their scientific expertise to offer
13 opinions on why the EIA test is reliable and produced a valid result.

14 Finally, similar to Plaintiff’s reliability objections, the remainder of
15 Plaintiff’s relevance objections implicate questions regarding the credibility and
16 weight of the evidence, which are the province of the jury. The Court also believes
17 that, to the extent that Plaintiff believes that he would be prejudiced by intoxication
18 evidence, Plaintiff could alleviate this prejudice by undermining the credibility of
19 the evidence. *See Donahue*, 105 Wash. App. at 74-75 (“Unlike the per se offense,
20 [a party] may attack the accuracy and reliability of the technique or method used in
21 analyzing the blood alcohol level.”). Thus, the Court denies Plaintiff’s Motion to
22 Exclude Mr. Capron and Dr. Norton.

23 c. Plaintiff’s Motion to Exclude Dr. Loftus

24 Plaintiff requests that the Court strike defense expert Dr. Geoffrey Loftus,
25 PhD, because his testimony is neither reliable nor relevant. First, for reliability,
26 Plaintiff argues that Dr. Loftus’s unsigned draft report frequently misquotes
27 Plaintiff’s deposition testimony without citing to the transcript; ignores other
28 evidence in the record; fails to quantify his methods or the data he relies on; and

1 generally concludes that Plaintiff was either lying during his deposition, was
2 intoxicated during the collision, or has developed a false memory about the
3 collision. Second, for reliability, Plaintiff argues that Dr. Loftus's testimony is not
4 a proper subject for expert testimony because jurors are capable of making
5 determinations related to a witness's perception of an event and how that
6 perception might be affected by outside factors, such as lighting, attention, and
7 stress. Finally, Plaintiff argues that, even if Dr. Loftus's testimony is proper expert
8 testimony, it should be excluded because it is unduly speculative and prejudicial.

9 Defendants in response argue that Dr. Loftus's testimony is both reliable and
10 relevant. First, for reliability, Defendants argue that Dr. Loftus is a Professor
11 Emeritus of Psychology at the University of Washington and has studied human
12 and perception for approximately five decades. Defendants also argue that Dr.
13 Loftus has performed many published studies regarding how a memory is formed
14 and then subsequently recalled. Second, Defendants argue that Dr. Loftus's
15 testimony is relevant because it will help the jury understand how different
16 witnesses to an event can form significantly different memories, even though both
17 witnesses believe themselves to be telling the truth. Moreover, Defendants state
18 that Dr. Loftus will testify about how memory can fail and how this can affect
19 eyewitness testimony, which will aid the jury in making credibility determinations.

20 Plaintiff in reply argues that Defendants "have abandoned most of the
21 opinions set forth in [Dr. Loftus's] unsigned draft report" and instead appear to
22 suggest that Dr. Loftus will only testify regarding general principles of perception,
23 memory, and memory formation. However, Plaintiff argues that even this limited
24 testimony should still be excluded because Defendants will use Dr. Loftus's
25 testimony to suggest that Plaintiff's memory of the collision is false. Specifically,
26 Plaintiff states that because "there is no purpose for Loftus's testimony other than
27 burnishing Defendants' arguments about Plaintiff's credibility with a patina of
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1 expertise, the danger of unfair prejudice is palpable and the testimony should be
2 excluded.” ECF No. 117 at 6.

3 The Court grants Plaintiff’s motion in part and excludes the portions of Dr.
4 Loftus’s expert report and testimony that are not grounded in a fair characterization
5 of the evidence. Specifically, Dr. Loftus concludes that Plaintiff’s memory of
6 Defendants’ truck crossing the center line and driving towards him is “implausible
7 on the face of it, is not one that he had recounted prior to his deposition, and is
8 inconsistent with other evidence Why then did Mr. Robertson describe a
9 memory that is so widely contradicted by other evidence? There are two
10 possibilities. The first is that Mr. Robertson is lying. The second is that Mr.
11 Robertson developed a *false* memory of Mr. Dorn crossing the centerline and
12 aiming at him—and that in his deposition, he accurately and honestly described
13 this false memory.” ECF No. 113, Exhibit 2 at 2.

14 Dr. Loftus’s first assertion that Plaintiff’s account of the events is
15 “implausible on its face” is not grounded in his expertise. Dr. Loftus is a professor
16 of psychology, not an accident reconstructionist specialist—he has no way of
17 concluding that the collision as Plaintiff describes it was “implausible.” As for Dr.
18 Loftus’s second assertion that Plaintiff had never provided this version of events
19 prior to his deposition, this is outside the scope of Dr. Loftus’s knowledge. Dr.
20 Loftus does not know Plaintiff personally and has seemingly never spoken to
21 Plaintiff in person—thus, there is no way for Dr. Loftus to know whether Plaintiff
22 has told a consistent story regarding the collision. Finally, Dr. Loftus’s third
23 assertion that Plaintiff’s account is “inconsistent with other evidence,” this is an
24 exaggeration of the evidence in the record. Although Plaintiff’s account is
25 inconsistent with some testimony and evidence, it is also consistent with other
26 testimony (*i.e.*, testimony from Laura Liebman, who is Plaintiff’s partner and who
27 was in the car with Plaintiff on the night of the accident). Thus, for Dr. Loftus to
28 jump from “Plaintiff’s account is inconsistent with some evidence in the record” to

1 his conclusion of “Plaintiff is either lying or has a false memory” is not supported
2 by the evidence. Thus, the Court excludes these portions of Dr. Loftus’s report as
3 unreliable because they lack a basis in Dr. Loftus’s expertise, knowledge, and the
4 factual record.

5 However, the Court denies Plaintiff’s motion for the remainder of Dr.
6 Loftus’s report and testimony. The Court finds that Dr. Loftus is qualified to testify
7 as a general expert about memory and perception of eyewitnesses and that his
8 testimony would be helpful to the jury in reconciling the conflicting accounts of
9 the accident.

10 **II. Providence Sacred Heart Medical Center’s Motion for a Protective** 11 **Order or to Quash or Modify Subpoena**

12 Providence Sacred Heart Medical Center (“PSHMC”), an interested third
13 party in this case, requests that the Court issue a protective order or, in the
14 alternative, quash or modify Defendants’ subpoena. Specifically, PSHMC argues
15 that Defendants’ February 1, 2022 Amended Subpoena to Testify at a Deposition
16 in a Civil Action seeks protected and confidential information about the hospital’s
17 internal policies and procedures, as well as about the technical specifications of the
18 EIA test, which is subject to a confidentiality agreement between PSHMC and
19 Siemens. PSHMC requests that the Court (1) issue a protective order to prevent the
20 hospital from disclosing Items 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, and 13 in the Amended
21 Subpoena; (2) quash the subpoena in full; (3) modify the subpoena to remove these
22 requested items; or (4) issue a protective order to prevent the disclosure of the
23 requested information outside of the scope of the present litigation. PSHMC also
24 requests that its Motion for a Protective Order be heard on an expedited basis.

25 Defendants in response agrees to proceed in accordance with PSHMC’s
26 fourth proposed option: specifically, for the Court to issue a protective order to
27 prevent disclosure outside of the present litigation. Defendants state this will allow
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1 them to seek evidence relevant to their affirmative defense of intoxication, while
2 also alleviating any confidentiality concerns.

3 The Court agrees that PSHMC's fourth proposed option is the most
4 appropriate. Thus, the Court grants PSHMC's request for a protective order to
5 ensure that the requested information is not disclosed outside of the current
6 litigation.

7 **III. Defendants' Motion to Continue Briefing Deadlines**

8 In their motion, Defendants request that the Court continue the briefing
9 deadlines associated with Plaintiff's Motion to Exclude Mr. Capron and Dr. Norton
10 until after Defendants have been allowed to depose the Person Most
11 Knowledgeable from Providence Sacred Heart Medical Center. However, the
12 Court has already ruled on Plaintiff's Motion to Exclude. Thus, the Court denies
13 Defendants' motion as moot.

14 Accordingly, **IT IS HEREBY ORDERED:**

15 1. Plaintiff's Motion to Exclude Defense Experts Norton, Capron, and
16 Ries, ECF No. 79, is **DENIED**.

17 2. Defendants' Motion to Continue Briefing Deadlines Associated with
18 Plaintiff's Motion to Exclude Expert Witnesses, ECF No. 94, is **DISMISSED as**
19 **moot**.

20 3. Plaintiff's Motion to Exclude Loftus, ECF No. 98, is **GRANTED in**
21 **part and DENIED in part**.

22 4. Providence Sacred Heart Medical Center's Motion for Protective
23 Order, or in the Alternative, to Quash or Modify Subpoena, ECF No. 125, is
24 **GRANTED in part**.

25 5. Providence Sacred Heart Medical Center's Motion to Expedite, ECF
26 No. 126, is **GRANTED**.

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ORDER RE: MOTIONS # 15

1 6. The parties **shall** file a Stipulated Protective Order regarding PSMC's
2 confidential information on or before **February 23, 2022**.

3 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to file
4 this Order and provide copies to counsel.

5 **DATED** this 16th day of February 2022.



10 *Stanley A. Bastian*

11 Stanley A. Bastian
12 Chief United States District Judge
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